

Consumer Finance Monitor Podcast (Season 8, Episode 50): Fair Lending Developments Under Trump 2.0 – Part 1

Speakers: Alan Kaplinsky, John Culhane, Jr., Richard Andreano, Jr. and Bradley Blower

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, the founder, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program.

For those of you who want even more information, either about the topic that we'll be exploring today or really any other topic in the world of consumer financial services law, don't forget about our blog, which also goes by the same name as our podcast show, namely Consumer Finance Monitor. We've hosted our blog since 2011, when the CFPB became operational, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at BallardSpahr.com.

And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you have accessed our podcast show.

Also, please let us know if you have any ideas for other topics that we should consider covering or speakers that we should consider inviting as guests on our show.

So our topic today is both very timely and very consequential, namely the impact of the current Trump administration on fair lending enforcement and policy, including but not limited to such things as redlining, disparate impact under the Equal Credit Opportunity Act, and the broader landscape of how discrimination in lending is defined, detected, and addressed in 2025 and certainly for the rest of Trump's term in office.

We'll also cover a number of other subjects, including President Trump's executive order regarding fair access and debanking. And indeed, on September 24th, we produced a webinar entirely on the debanking subject that was entitled, A New Error for Banking: What President Trump's Debanking Executive Order and Related State Laws Mean for Financial Institutions, Government, and Banking Customers. That webinar, which is available on our website, will very soon be repurposed into a two-part podcast show.

So to help us explore these issues, I'll be joined today by our very special guest, Brad Blower, and my colleagues in the Consumer Financial Services Group and Mortgage Banking Group at Ballard Spahr, namely Rich Andreano and John Culhane, who will also share their insights on the direction of fair lending policy in Washington and what it means for the financial services industry, consumers, and regulators.

So let me tell you a little bit about Brad. Brad started the company that he is with now, it's called Inclusive Partners LLC, and he did it to collaborate with nonprofits and for-profits working on financial inclusion, based on over 35 years of experience providing legal policy and strategic advice in the areas of fair lending, consumer protection, and community reinvestment. Brad's goal is to support how organizations navigate these complexities, seeing around the corners and connecting the regulatory and strategy intersections. His varied and unique base of extensive experience includes guiding government agencies, large financial institutions, fintechs, and nonprofits to do more for underserved

communities, while at the same time enhancing their positive impact, growth, profitability, and relevance. Throughout his career, Brad has been a guide on a wide variety of initiatives, including housing and fair lending policy, effective and compliant use of AI and alternative data, strategies for improving community reinvestment, appraisal discrimination, and small business lending.

A little bit earlier this year, Brad was a guest on another podcast show that we produced. So Brad, a very warm welcome back to you.

Bradley Blower:

Thank you, Alan. It's great to be back on the podcast.

Alan Kaplinsky:

Okay, let me now introduce my two colleagues. Rich Andreano is the practice group leader of the Mortgage Banking Group at Ballard Spahr. He's a leader of the Ballard Spahr Fair Lending team and a member of our Consumer Financial Services Group. He has devoted 40 years of practice to mortgage banking and consumer finance law, including, as pertinent to the subject today, the Equal Credit Opportunity Act, the Fair Housing Act, the Home Mortgage Disclosure Act, and related laws. Welcome back, Rich. Happy to have you on our show today.

Richard Andreano, Jr.:

Thank you, Alan. Glad to be here.

Alan Kaplinsky:

And last but certainly not least, John Culhane. He's senior partner in the firm's Consumer Financial Services Group and a member of its fair lending team. His fair lending practice includes experience as government attorney, in-house counsel and outside counsel. As a government attorney, he consulted on fair lending exams and potential enforcement actions. As in-house counsel, he advised on all manner of compliance issues, including the drafting of policies and procedures, the development of proprietary credit scoring systems, the requirements for adverse action notices, and the application of fair lending statutes and regulations to commercial loan programs.

As outside counsel, among other things, he's run mystery shopper programs, established special purpose credit programs, reviewed judgmental and automated underwriting systems, supervised disparate impact reviews, rebutted allegations of pattern or practice violations in the fair lending area, and defended clients accused of redlining by bank regulatory agencies.

He's the former chair of the ABA's Subcommittee on Fair Lending that is part of the Committee on Consumer Financial Services. And he frequently writes and speaks about Equal Credit Opportunity Act compliance and other fair lending issues.

Let me just say, in addition to that, John is a charter member of the Consumer Financial Services Group who joined Ballard Spahr more than 30 years ago, along with me and other people that came from another law firm. Indeed, we have practiced together for about 35 years. So John, welcome to you.

John Culhane, Jr.:

Thanks, Alan.

Alan Kaplinsky:

This is how we're going to proceed today. I have a number of questions for you, Brad, which I'll pose to you. And then after you answer each question, I'll give Rich and John the opportunity to respond or otherwise chime in. And if you have anything that you want to say in response to that, of course you're welcome to do that. We're going to have a conversation today about a number of very important topics.

And we could really call this Fair Lending Trump 2.0. And I think it's fair to say that there has been a bit of a sea change, maybe more than a bit of a sea change in fair lending oversight and enforcement from the Biden administration to the second Trump administration. Brad, can you lay out for our listeners at a high level some of the biggest changes before we dive in deeper than that?

Bradley Blower:

Sure, Alan, thank you. And I should add that I've worked both at the Justice Department and the Federal Trade Commission on these issues, as well as advocacy groups and in addition to my own firm now. So I've seen it from a variety of perspectives and I've never seen quite the pendular swing from one administration to another, from the Biden administration to the second Trump administration. And I'm just going to list out some of the things that I've seen happen over the last eight to nine months under the second Trump administration.

The first is that the administration laid out pretty early on, within the first month or so, that it was going to view all federal programs, grants, contracts to eliminate any kind of emphasis on diversity, equity, and inclusion, DEI. And that was more sort of a broad statement of principles. And what we've seen after the issuance of that executive order is a lot of changes in federal policy, both from the administration directly and from various agencies.

There was an executive order that came out in April called the Restoring Equality of Opportunity and Meritocracy order, which essentially said that the federal government thought that disparate impact, one of the theories under the federal fair lending laws, was not going to be enforced by the federal government or used in supervision. So the administration took the step of actually redlining, in a different kind of way than we normally think of redlining, redlining the text of the various agencies that enforce the fair lending laws to eliminate any reference to disparate impact and take out sections that discuss disparate impact. So clearly, there's not going to be any emphasis by that by the Trump administration. And we'll talk about that a bit more.

There are also signs that the administration is going to limit the scope of the Equal Credit Opportunity Act. We saw a little bit of that in its effort to try to vacate a consent order, a settlement in the Townstone Financial case where the administration has views about whether you can actually bring a claim of discouragement under the Equal Credit Opportunity Act.

And that's in essence saying that the policy on the Biden administration was that pre-application was a pre-applicant. So if you're in the process, you haven't applied yet, but you're thinking of applying, you're in communication with a creditor, that would be covered if in some way the creditor discouraged the applicant, the person from applying for a loan. So we've seen a bit of a philosophical point made by the administration that they may limit ECOA on discouragement.

We've also seen some guidance come out on AI. Under the Biden administration, you had some guidance that came out from the CFPB in particular that specified what creditors, what companies needed to do when they were using AI or any kind of model in terms of understanding that model, the clarity of their understanding. And they needed to have the ability to explain how their model worked in terms of, for instance, providing reasons to consumers about why they were denied for credit or maybe they were getting credit under less favorable terms.

That guidance has been rescinded by the CFPB. And the administration came out actually with an AI action plan a few months ago, which basically said, "Look, the administration wants the US to further advance its AI abilities, it wants to

beat China. And therefore, it's going to take a dim view of any kind of rules or regulations that are going to hinder the development of AI." Now, the administration was not saying we're getting rid of consumer protection laws and fair lending laws, but it was saying it was going to really view laws and regs, even previous actions by the government, consent orders, to see if there was anything that would be hindering the development of AI. So that's going to be an interesting thing we'll see play out over the next couple of years.

And just a couple more things I'll mention so we can get the discussion started, but this is what I'm seeing in terms of the sea change that you mentioned. There's also a concern in the advocacy community, and this is my view, that the Special Purpose Credit Program is going to be reevaluated by the administration. You can develop a special purpose credit program under the Equal Credit Opportunity Act. That's clear from the language of ECOA and regulation as it stands now. But there was some additional guidance provided by HUD during the Biden administration that just as developing a special purpose credit program would not be considered discrimination under ECOA, it would therefore also not be considered discrimination under the Fair Housing Act. With a theory that would be inconsistent to have two federal fair lending laws that were basically inconsistent.

So there was guidance on that from the HUD general counsel. That guidance has been hidden by HUD. It's no longer available. It hasn't rescinded, but there is concern in the advocacy community that it might be being reevaluated at this point.

And then some of the bigger logistical things we've seen with this administration, I would be remiss in not mentioning the dismantling of the CFPB. Firing of employees and basically downsizing that agency significantly and limiting its ability to issue rules and do enforcement action. So as one of the primary enforcers of agencies out there, the CFPB along with Justice and the Federal Trade Commission, that's a major concern for the advocacy community of the administration's position that the CFPB should play a much smaller, more limited role.

And then we'll get into this later, but certainly, you have revisiting the small business data collection rule and what will be required for reporting for small business lenders there. The rescinding of the 2023 Community Reinvestment Act rule and going back to the 1995 rule, which basically you've got a whole potpourri of changes by this administration, which we didn't see in the first Trump administration, to change the rules of the game to basically view discrimination and the enforcement of fair lending laws as looking at the more blatant activity, but basically putting a skeptical eye on any kind of use of statistics or other indicia of discrimination, which the Trump administration feels were just limiting our ability to develop AI, to do business in a fair way and felt that it was prejudicial to the economy. And that's been the sea change that we've seen over the last eight to nine months.

Alan Kaplinsky:

Either John or Rich, you have anything you want to add?

Richard Andreano, Jr.:

Yeah, what we saw beforehand, prior to the Trump, in both Democratic and Republican administrations under the fair lending laws, there was a view as there were protected classes and non-protected classes. And the white non-Hispanics or males were viewed as not protected, and minorities, females were viewed as protected. What the Trump administration has said is there's no protected or non-protected, everyone is entitled to the protections of the Fair Housing Act and Equal Credit Opportunity Act and other civil rights laws. So there's no such thing as discrimination or reverse discrimination, two different things. It's just discrimination no matter who's involved. And that is a major change in thinking in approach to the fair lending and fair housing laws that we've seen, and that was the approach of both Republican and Democrat administrations in the past until now.

Alan Kaplinsky:

Right. Right. Thank you, Rich. John, anything?

John Culhane, Jr.:

Well, I agree with what Rich said. That's certainly a big change. And I think if we're talking about a sea change, to use that metaphor, we sort of had a tsunami of activity under the Biden administration and we now seem to be heading for a drought or near drought under the Trump administration. Although there do seem to be isolated areas where there will be continued activity and we just have to keep an eye on those areas, particularly, as Rich mentioned, discrimination against individuals who hadn't traditionally been considered to be members of protected classes and covered by the fair lending laws.

Alan Kaplinsky:

I think you may be alluding to the Trump executive order dealing with fair access and debanking, John, have I got that right?

John Culhane, Jr.:

Yes.

Alan Kaplinsky:

Yeah.

John Culhane, Jr.:

Yeah, I think that's the area where we're going to see activity and we'll talk more about that in the program.

Alan Kaplinsky:

We'll definitely get into that a little bit later. Brad, you referred to, among the litany of things that you mentioned where we've seen a sea change, you refer to redlining. That was an enforcement priority of the Biden administration. What approach did the Biden administration take? And how has that changed in the new administration? And is the Trump's administration only proactive or are they also looking back in their approach to their new doctrine on fair lending?

Bradley Blower:

Yeah, there's definitely been a significant change in the approach to redlining. Under the Biden administration, within a year of that administration starting, the Biden administration, particularly the Department of Justice and CFPB launched an anti-redlining campaign. And over the course of the administration, I believe there were at least around 16 cases brought against lenders for redlining. That's basically either excluding people in protected classes or neighborhoods where there was a significant number of people in protected classes from getting loans, or reverse redlining, which was dumping your worst products as a lender into those same communities. So you saw a significant emphasis on enforcement by those agencies.

And traditionally, the US government had brought redlining cases which included indicia almost of some kind of intent. That was kind of the traditional view of redlining, that there would be not only statistical evidence, but there would be indicia of some kind of racial animus or some kind of bias. And under the Biden administration, there was a use of what was called the proportional distribution test, which basically said, "We're going to look at lenders and we're going to compare them to other lenders in the same relative size group, between 50% and 200% of their volume, and see how

they're doing. And if we're seeing significant differences in the number of applicants that they're getting from people in protected classes or we're getting significant differences in the number of loans given or where branches are located, we're going to bring a redlining case." And that's why you saw significant activity under the Biden administration.

What I think you're seeing under the Trump administration so far is proclamations that, "Look, we're not doing that anymore. Just as we're not going to rely on disparate impact reviews and we're not going to bring any disparate impact cases, at least at the federal government level, we're not going to rely on just statistical information to bring any kind of redlining case. You're going to need to see some kind of indicia of intent." So it's an extreme scaling back of redlining. Doesn't mean there won't be redlining cases, but I think you're only going to see them when there's been some kind of blatant disparity.

Now, I would say under the Justice Department, under the Biden administration and the CFPB, and I know this from my own experience in dealing with them, I would take cases to them for consideration, they only brought redlining cases when there were significant proportional differences. They weren't foot faulting lenders for bringing, if they had just a slight difference in the number of loans or applicants. There had to be basically like three times the disparity level of other lenders. So they were only bringing cases against the rogue or the outliers in the lending community, in my view.

I'd be interested to hear what John and Rich have to say about that. But you're not going to see cases brought based upon just statistical evidence, there's going to have to be other indicia. So we've even seen the Trump administration Justice Department and CFPB go back and try to unwind or terminate some settlements that were entered as part of those redlining enforcement efforts. And it's been a mixed bag, but some of them have been vacated or shortened in terms of how long they're in effect, based upon the actions of the Trump lawyers at the DOJ and CFPB.

Alan Kaplinsky:

Yeah. Okay, Brad. I assume that Rich and John are going to have a lot to respond to you on what you've just said, at least insofar as what went on in the Biden administration. I got that right?

Richard Andreano, Jr.:

Yeah. Yeah, it was. It was in October 2021 when then Attorney General Garland announced the initiative to combat redlining. And on that same day, they announced the first consent order with a bank, and that was followed by a steady stream of consent orders, and in fact, the first one involving a credit union. Traditionally, only banks had been subject to redlining consent orders.

And my understanding was at the end of the Biden administration, there were still many investigations underway. I surmise that those investigations likely have been or will be closed. And it looks like what the Trump administration's really doing, Brad noting that they're not going to pursue disparate impact theories, just disparate treatment, but redlining traditionally was pleaded as both disparate treatment and disparate impact in that it was intentional. You intentionally intended not to lend in minority areas of your service area. So you're wondering where they're going to go with that.

Clearly, they're not going to base a claim just on statistics. But often, what you'd see in the past with the government, they would have statistics and they may use those to first identify potential candidates for further assessment. But then they would look at other things such as where were offices placed? What was the loan originator staff? What did they look like? What was the marketing outreach? And they look at all those other factors and that to them would show intent, that they were intending not to lend in a particular area, and it was then buttressed by the statistics.

So how that's going to be going forward, it looks like they're out of the redlining business. Unless it was some very egregious situation, I don't see a claim being brought by this administration.

John Culhane, Jr.:

Yeah, I agree with that. Certainly, the Biden administration's combating redlining initiative was an effort to marshal the entire federal government and, as much as possible, states as well to act in this space. I think there was much more of a premium on getting referrals from the bank regulatory agencies, which had been fairly small in number up to the Biden administration taking office. And then they jumped significantly as indicated by the Department of Justice's annual reports on Equal Credit Opportunity Act compliance. And they were using US attorneys to provide information on the ground and very aggressive.

I think one of the things that was viewed as a hallmark of redlining, as Rich said, was the location of branch offices, regardless of the history or circumstances under which those branch offices had been acquired. And the result was, in some respects, to penalize financial institutions that were growing by acquiring branches or merging with other banks for the failure to separately allocate funding to create new offices, which is not an inexpensive endeavor.

And it's clear we're not going to see that now. And as Rich said, I think we're probably not going to see much in the redlining arena at this point unless we see some activity at the state level. And I'm not sure at this point just how active state attorneys general are going to be. Certainly, historically, both New York and Massachusetts had brought redlining actions, but I don't know that that will continue. Maybe Rich has more to comment on about that.

Richard Andreano, Jr.:

One thing I think a factor in what the states do is funding because already in many cases, states we're challenged in funding. And now with the cutback of federal government funds flowing to the states, that's going to, I think, exacerbate the problems in what they can choose to go at unless they do some significant reallocation of state resources. So I think while the states certainly have, in many cases, the desire to step in, the question is are they going to have the resources to do it?

Bradley Blower:

Right, and I would just add that one of the concerns of the advocacy community, and I used to be general counsel of the National Community Reinvestment Coalition, and one of their big efforts that they work on are working with banks on community benefits agreements and identifying ways, when there are mergers between banks, that branches aren't just closed in the Black and Hispanic neighborhoods, but they're equally... There are efficiencies that the two banks bring to the merger, but they don't just close in one type of community and not in another. And I think you're not going to see cases brought in instances where you see mergers and you see branch closures primarily in minor communities. That is the concern, it still can be the concern of the advocacy community.

I do think because of the downsizing of the CFPB and the change in its enforcement scope, you've seen kind of a diaspora of staff from the CFPB going to the states. So I think the states are gaining expertise because of that exodus from the federal government to the states, and so you're starting to see some cases being brought by Massachusetts or the California Department of Financial Protection and Innovation. You're going to see more and more cases being brought to the state level because of de-emphasis at the federal level in enforcing.

Alan Kaplinsky:

Are they redlining cases, Brad, or are you referring in general to other areas?

Bradley Blower:

So far they've been disparate impact cases, but I think you probably will see some redlining cases down the road.

Alan Kaplinsky:

Okay. Well, let's turn to another topic that you alluded to and was part of your litany of things that have happened under Trump 2.0, and that is the coverage of the Equal Credit Opportunity Act. And you refer to the fact that there may be an effort afoot to amend ECOA to make it clear that it would cover discouragement of applications. Right now, it's clear that it covers applications and things that happen after somebody has actually become a borrower, but not so clear as to whether ECOA covers discouragement. And one of you could describe for our audience what happened under the Biden administration and where you think things are headed now in this question of ECOA coverage.

Bradley Blower:

Yeah. One thing to think about is just when you think about the two main federal fair lending laws that are out there, the Fair Housing Act and the Credit Opportunity Act, the Fair Housing Act refers to persons, and so in terms of who can bring a claim, who can be sued, so it's very broad in terms of its scope. The Credit Opportunity Act uses terms like creditors and applicants, and so that has been used as a cudgel by some financial institutions to say, "Look, discouragement shouldn't be covered. You shouldn't be able to bring a claim for discouragement under the Equal Credit Opportunity Act for someone who hasn't applied for a loan yet."

And this was kind of tested out in the Townstone Financial case, and this is really a good microcosm of understanding the issue. And this was a mortgage lender in the Chicago area. And I should note this case was brought by the CFPB during the first Trump administration. It wasn't a Biden administration case, it was brought during Trump one.

And this mortgage lender president had a radio show where he would be on once a week, was basically a promotion for the company. And he would say a lot of things like describing certain areas of Chicago, particularly the minority areas as jungle areas, and you shouldn't drive your wife through those areas. And the CFPB looked at some of those statements from the radio program, looked at the low application rate by people in protected classes to Townstone and the low number of loans made to people in protected classes and brought a case.

And Townstone challenged that case saying, "Aha. Wait, you can't bring a case under ECOA because discouragement is not covered by the Equal Credit Opportunity Act because only applicants are covered, not pre-applicants." And the district court in the Northern District of Illinois, strangely enough, agreed with that theory initially. It was overturned by the Seventh Circuit, which said clearly, discouragement is covered under ECOA. And that Seventh Circuit precedent stands, as to similar precedent in other jurisdictions, other circuits around the country.

And then flash forward to the second Trump administration, which went into the same federal district court that had agreed with Townstone initially and said, "We want to vacate the order because we think that there was bad acts by the CFPB staff. They were looking at, they were penalizing free speech. They targeted this guy because he was a Trump supporter and we think you should vacate the order."

And lo and behold, the same judge that had initially agreed with Townstone said, "I'm not going to vacate the order. There's a strong preference for the finality of settlements under Rule 60, and I'm not going to let you throw your colleagues, the CFPB, under the bus from the first Trump administration. They brought this case in good faith," and so the settlement wasn't vacated.

So it's a really interesting journey of that case, but also the situation of, of course, discouragement's covered under the Equal Credit Opportunity Act, and every circuit that's viewed this issue has said it is. This would be akin to a mortgage lender or a creditor putting a sign in their window and saying, "People in protected classes need not apply." That's something that has to be covered by. It's certainly covered by the Fair Housing Act, and I would argue that it's also covered by the Equal Credit [inaudible 00:33:16]-

Alan Kaplinsky:

And also, Brad, Reg B under-

Bradley Blower:

And Reg B is very... Yes.

Alan Kaplinsky:

Specifically reports to cover discouragement, and the issue is whether that regulation conforms with ECOA.

Bradley Blower:

Absolutely. Absolutely. But so there is concern that the Bureau could go in and propose to change Reg B to not cover discouragement and say, "Look, we're going to look to the language of ECOA itself, which talks about applicants only." That is a concern that the advocacy community has and I have.

There's also a concern that the Bureau might even be very clear that it does not view under Reg B that disparate impact is covered under the Equal Credit Opportunity Act, even though there're decades of jurisprudence saying it is. So those are possibilities that this administration could implement under the CFPB.

Alan Kaplinsky:

Rich or John?

Richard Andreano, Jr.:

Yeah, the spring rulemaking agenda, which came out, well, for a few seconds in August, then it disappeared and came back in September, has ECOA listed on it as a rulemaking item. And it's pretty vague as to exactly what they're looking at. But I agree with Brad, I think the two things that could be on their list are, one, particularly disparate impact since it's now the policy of the Trump administration that they will not pursue disparate impact claims. Do they want to take that language out of Reg B, that does indicate the fact that you can bring those claims under ECOA?

And then also do they get to the discouragement issue? Apparently trying to succeed, but they couldn't get done in Townstone, trying to succeed then now through rule writing. That obviously would immediately become subject to litigation, and that may be their intent. They may want to get this issue up before the Supreme Court because with this Supreme Court, I have a pretty good idea how the Supreme Court would rule on that issue, and that may be the goal of the Trump administration.

Alan Kaplinsky:

Yeah. John, anything that you'd like to add on this?

John Culhane, Jr.:

Well, disparate impact is in kind of an odd posture under Equal Credit Opportunity Act and Regulation B. The words that we usually expect to see in a civil rights statute to encompass disparate impact don't appear in the Equal Credit Opportunity Act and Regulation B. There is legislative history going back to, gosh, almost the beginning of enactment of the statute indicating that an effects test was intended. But there's certainly an argument that it was never actually incorporated into the statute.

And oddly enough, I think the rulemaking that went on to take footnotes out of the regulation and move them into the commentary may do a disservice to those who are arguing for disparate impact because initially, the staff of the Federal

Reserve Board had, in drafting Regulation B, had included a footnote to the regulation, so part of the text of the regulation specifically saying that disparate impact was covered. And number of years ago, when the rules were reviewed, that text moved from the regulation to the commentary, which is I think a much more vulnerable and less official location for that interpretation.

So I think it is likely that we will see the CFPB, assuming there are enough people left there to write rules, take on that issue with the goal of not only changing the rule, but getting the issue up before the Supreme Court.

Bradley Blower:

And Alan, I do think that is the goal of the administration. My concern, in addition to weakening the fair lending laws, if that happens, is that you'll have this incredible inconsistency in the law if that does happen, that there's a Reg B change, that disparate impact isn't covered. In that now you'll only be able to bring disparate impact claims under the Fair Housing Act because the Supreme Court has spoken clearly under Inclusive Communities that you can do that, but you can't bring a disparate impact claim under any other type of credit. And that seems like a real inconsistency. It doesn't really make sense that only one type of credit would be subject to a claim and not others. So that's the inconsistency that would develop.

Alan Kaplinsky:

Yeah, no, I'm wondering whether any of you have looked back at the legislative history. You alluded to it, John. But I would've thought that when ECOA was first enacted into law, there would've been discussion about whether discouragement was covered under ECOA, that it would've been some kind of dialogue and that would've been resolved. I take it that there is nothing like that. Am I right?

John Culhane, Jr.:

Well, there's legislative history on disparate impact.

Alan Kaplinsky:

What about discouragement?

John Culhane, Jr.:

I haven't looked at the discouragement history in some time, so I can't really comment on that. But I think that if you're an advocate for those positions, you're running up against a Supreme Court that believes that if Congress wants to do something, it puts the language in the statute. It doesn't talk about what it thought it was doing, it actually does something.

And here, you have statutory language which is certainly less clear on disparate impact and uses discouragement only in the context of referrals from the banking agencies to the Department of Justice. And in that context, it looks more like it's bad practices regarding applications broadly. So there's sort of a suggestion that somebody actually has to be in the door and started the process and then have their application discouraged.

Bradley Blower:

Yeah, so just to finish out this discussion. I'm certainly concerned that the Bureau will amend Reg B to incorporate both of those concepts that discouragement and disparate impact aren't covered. But in a way, in the wake of Bright Loper where the Supreme Court said, "You don't really need to defer to agencies for their expertise," it really doesn't matter that much what the CFPB says because ultimately, the courts are going to look to the statute, as John said. And given the

current makeup of the Supreme Court, I'm concerned that there will be a real look by the court only to the language that's actually in the statute, which says applicant. And there will be not much deference given to the Fed's long history interpreting it to cover discouragement, and the CFPB's as well for most of its history.

Alan Kaplinsky:

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